APPENDIX 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 04-3026 (GEB)

[Filed September 22, 2006]

J.C. VAN APELDOORN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
QWEST COMMUNICATIONS INTERNATIONAL, INC., et al.,	)	
	)	
Defendants.	)	
	)	

This matter comes before the Court upon defendant Qwest Communications International, Inc.'s ("QCII") appeal of Magistrate Judge Falk's June 16, 2005 Order. The Court, having considered the parties' submissions, and having conducted a hearing on September 7, 2006, and for the reasons discussed during the September 7, 2006 hearing;

IT IS THIS 21st day of September 2006 hereby

ORDERED that QCII's appeal [docket entry # 51] is DENIED.

/s/ _____
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case No. 04-cv-3026

402 East State Street
Trenton, New Jersey 08608

[September 7, 2006, 11:12 a.m.]

VAN APEL DRORN [*sic*.],	)
	)
Plaintiff,	)
	)
v.	)
	)
Qwest, et al.,	)
	)
Defendants.	)
	)

TRANSCRIPT OF TELECONFERENCE
BEFORE HONORABLE
GARRETT E. BROWN, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

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* * *

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THE COURT: This is van Apel Doorn [*sic.*] v. Qwest, 04-3026. I'm Chief Judge Brown. And who do we have on the phone for the plaintiff?

MR. BERGSTEIN: It's Mel Bergstein, Judge, and if my colleagues in Washington could introduce themselves.

MR. MCMILLEN: Good morning, Judge. My name is Richard McMillan [*sic.*] and I've got (indiscernible) with me, one of my partners.

MR. CURTIN: Good morning, Judge. It's Tom Curtin. I represent Qwest, and with me on the phone also from Washington is my colleague Jim Denver [*sic.*] from the Boies Schiller Firm.

THE COURT: All right. Anyone else on the phone?

MR. SILVERSTEIN: Yes, Your Honor, Joel Silverstein from Stern & Kilcullen for defendant Joseph Nachio [*sic.*] (phonetic).

MR. FINKELSTEIN: It's Ira Finkelstein, Harnik & Finkelstein, in New York, and we represent John McMaster.

THE COURT: Anyone else?

MR. BERRY: Drew Berry and Jim Sheil of McCarter & English for McMaster and Woodruff defendants.

THE COURT: Anyone else?
(No verbal response)

THE COURT: All right. Now this case, which was filed back on June the 29th, 2004, has a fairly lengthy history. I have reviewe4d [*sic.*] the docket and all of the filings

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here since the case was transferred to me on the 23rd of August. The first issue is the motion appealing the Magistrate Judge's decision of June 15th, 2005. I have read the decision. I have read the motion appealing, the opposition, and the reply. Having done so it seems clear to me that the Magistrate Judge's decision should be affirmed. I agree with the Magistrate Judge in the opposition [*sic.*] that it is not a dispositive motion, but even if it were dipositive [*sic.*] I would adopt it as a report and recommendation. I think it is well-founded in the law and facts and it will be hereby affirmed, or if it were dispositive, which it's not, adopted.

We have also pending a motion to dismiss which was filed on February 21st, '06. I have the motion to dismiss, I Have [*sic.*] the opposition and the reply. I will review that. I will decide it on the papers under Rule 78 unless I determine that there is any need for oral argument. We have also the motion for bond. We have discovery motions pending before Judge Falk. The motion for bond, which was filed on August 24th of this year, I will refer that to Judge Falk because it relates to the discovery, but it would appear to me that both of those probably should be considered by Judge

Falk after I rule on the motion to dismiss. So that's the status as far as I'm concerned. If it looks like the matter has somehow become moot or settled let me know; if not I will proceed to decide the motion to dismiss. Any reason why I should not do so?

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UNIDENTIFIED SPEAKER: I think you got it just right, Judge.

THE COURT: All right, well we'll hear from you as soon as I'm ready. Thanks.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

UNIDENTIFIED SPEAKER: Thank you.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: All right.

* * * * *

CERTIFICATION

I, Lori Auletta, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

March 27, 2007

LORI AULETTA
J&J COURT TRANSCRIBERS, INC.

APPENDIX 3

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. John C. Lifland
Civil Action No. 04-3026 (JCL)

[Filed June 16, 2005]

J.C. VAN APELDOORN, et al.	)
	)
Plaintiff(s),	)
	)
-vs-	)
	)
QWEST COMMUNICATIONS INTERNATIONAL, INC., et al.,	)
	)
Defendant(s).	)

ORDER

THIS MATTER having come before the Court upon defendants' motion to stay this case and compel arbitration and the Court having considered the papers submitted and having heard oral argument on March 3, 2005 and for the reasons placed on the record on June 15, 2005 and for other good cause shown;

IT IS on this 16th day of June, 2005

ORDERED that defendants' motion to stay the case and compel arbitration is hereby **denied.**

/s/ Mark Falk
MARK FALK
United States Magistrate Judge

Orig.: Clerk of the Court
cc: Hon. John C. Lifland, U.S.D.J.
All Parties
File

APPENDIX 4

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 04-3026

TRANSCRIPT OF PROCEEDINGS (OPINION)

[June 15, 2005 Newark, New Jersey]

J.C. VAN APELDOORN, et al.,

Plaintiff [*sic.*],

-v-

QWEST COMMUNICATIONS, et al.,

Defendants.

BEFORE: HONORABLE MARK FALK,
United States Magistrate Judge.

APPEARANCES:

WALDER, HAYDEN & BROGAN, ESQS.,
BY: MELVYN H. BERGSTEIN, ESQ.,
Attorney for the Plaintiffs

GRAHAM, CURTIN & SHERIDAN, ESQS.,
BY: THOMAS R. CURTIN, ESQ.,

&

O'MELVENEY & MYERS, ESQS., (D.C.)
BY: MATTHEW CLOSE, ESQ.,
JAMES DENVIR, ESQ.,
JON SHERMAN, ESQ.,
Attorneys for the Defendant Qwest

MC CARTER & ENGLISH, ESQS.,
BY: JOSEPH T. BOCCASSINI, ESQ.,
Attorney for the Defendant Individuals

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record taken stenographically in the above entitled proceedings.

_____
JOHN KEVIN STONE,
Official Court Reporter

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THE COURT: Please be seated.
Hello, counsel.
Before we go on the record.

(Discussion off the record).

THE COURT: I think we should go on the record.

This is the case of J.V. [*sic.*] Van Apeldoorn, et al., against Qwest Communications, Inc., et al. It's Docket Number, Civil Action 04-3026.

I initially advised the parties that I was going to place my opinion on the record today, and I offered the opportunity to do so over the telephone, but counsel wished to appear in person. So having appeared in person, I'd appreciate if you'd put your appearances on the record.

MR. BERGSTEIN: Mel Bergstein, I appear for the plaintiffs, Walder, Hayden and Brogan.

MR. CURTIN: Good morning, Your Honor.

Thomas Curtin; Graham, Curtin and Sheridan, I'd like to introduce my colleagues, Jim Denvir, Matthew Close and Jonathan Sherman.

THE COURT: How do you do.

MR. BOCCASSINI: Joseph Boccassini, for the individual defendants Noccio [*sic.*], McMaster and Woodruff.

MR. CURTIN: Judge, I should say this collective group represents Qwest.

THE COURT: Thank you. I understand.

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All right.

This is defendants' motion to stay this case and compel arbitration in London under the arbitration rules promulgated by the United Nations Commission on International Trade Law, which is UNCITRL. At least that's the way I'll pronounce it. The case stems from the bankruptcy and liquidation of KPNQwest NV, a Dutch telecommunications corporation. According to plaintiffs, the bankruptcy and liquidation have left a liquidation deficit of more than 3 billion dollars, which is still owing to creditors following liquidation.

Plaintiffs are two bankruptcy trustees appointed by the Dutch bankruptcy court. The defendants are Qwest Communications, Inc., a Delaware Corporation with headquarters in Denver that participated in a joint venture with non-party KPN, N.V., a Dutch telecommunications company, to establish KPNQwest NV. Defendants state that KPNQwest's goal was to construct and operate a pan-European fiber optic telecommunications network in order to provide services within and between Europe and other parts of the world. The individual defendants' [*sic*.] are John A. McMaster, a former CEO of KPNQwest, and Joseph Nocchio [*sic*.] and Robert Woodruff, who served on KPNQwest's supervisory board at various times. I believe they also had other positions.

The complaint is about a 125 pages long and

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essentially it alleges that the liquidation deficit was the result of a massive financial fraud primarily perpetrated by Qwest. Plaintiffs allege that Qwest

and the defendants violated certain U.S. fraud statutes, including RICO and Dutch mismanagement statutes in order to loot KPNQwest. Plaintiffs' RICO claims cite numerous instances of alleged fraud. In their papers and at argument plaintiffs repeatedly stated that none of the claims in the lengthy complaint is based on the violation of any agreement, nor are any of the claims contractually based, and also that none of the claims turns on the resolution arises [*sic.*] under any contract or contractual issue.

In its brief, plaintiff notes that recently Qwest pled no contest to a civil fraud claim brought by the SEC and agreed to pay 250 million dollars. Plaintiffs further contend that Qwest had fraudulently recognized approximately 3.8 billion in what plaintiff describes [*sic.*] as spurious revenues which resulted in substantial losses to shareholders when the Qwest stock price dropped from 55 dollars a share to a little over one dollar a share. Plaintiffs claim the fraud addressed in the SEC claims was the same revenue enhancement scheme that forms the basis of the trustees claims in this case which it claims [*sic.*] led to the collapse of KPNQwest.

Defendants, on the other hand, in addition to denying many of the operative allegations, describe the case

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as a complex international business dispute involving the mismanagement -- I'm sorry, involving the management and affairs of KPNQwest NV. Defendants suggest that KPNQwest fell into

bankruptcy after, and I suppose as part of the collapse of the telecommunications industry in 2002.

Defendants state at page 2 of their moving brief that the 125 page complaint never mentions the multiple agreements from which the dispute arises. The basis of this motion is defendants' contention that several agreements which they are entitled to enforce include arbitration provisions requiring the arbitration of claims in London. Contrary to plaintiffs' assertions, defendants claim the gravamen of the complaint is defendants' alleged failure to honor their obligations under arbitrable agreements, which caused KPNQwest's bankruptcy.

The central premise of plaintiffs' opposition to this motion is that neither the parties, nor the claims, fall within any arbitration clause at issue. More specifically, plaintiff claims [*sic*.] that none of the defendants is a party to any arbitration agreement; none of the claims raised by the trustees falls within any arbitration clause; and finally with respect to the trustees [*sic*.] mismanagement claim, under Dutch law plaintiffs say that claim is for the benefit of creditors and under Dutch law is "highly personal," to the trustees themselves and therefore is not

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subject to any arbitration agreement signed by the debtor KPNQwest. Defendants counter that since plaintiffs purport to bring a case on behalf of KPNQwest, KPNQwest's agreements to arbitrate under certain agreements should be enforced notwithstanding the fact that all defendants are

non-signatories and notwithstanding the fact that plaintiffs assert statutory RICO and Dutch law causes of action.

To address the agreements in which the arbitration clauses are:

Defendants contend that beginning with the joint venture agreement between Qwest and non-party KPN in 1999, KPNQwest signed various agreements with Qwest and KPN or their subsidiaries that govern the creation or governance of KPNQwest and otherwise relate to the terms under which KPN and Qwest purchased and sold services to KPNQwest. On February 26th, 1999, Qwest and KPN NV signed a Joint Venture Agreement which set out the terms on which KPNQwest was to be formed. This agreement included an arbitration clause. Qwest later assigned its rights under the Joint Venture Agreement to its wholly owned Dutch subsidiary, Qwest BV.

In April 1999, Qwest BV, KPNQwest and KPN NV together executed a Shareholders Agreement which set out certain rights, responsibilities and duties that the three parties would owe to each other. According to defendants, the Joint Venture Agreement between Qwest and KPN and the

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Shareholders Agreement among Qwest BV, KPN and KPNQwest were later combined in an Amended and Restated Joint Venture and Shareholders Agreement which was subsequently replaced by a Second Amended and Restated Joint Venture and

Shareholders Agreement. These later agreements were signed by KPNQwest, -- well, I should take that -- well, I'm sorry. These later agreements were indeed signed by KPNQwest, KPN and Qwest BV, and contain UNCITRL arbitration provisions.

Significantly, defendant Qwest was not a party to any of the agreements except the original Joint Venture Agreement.

To be more specific, defendants claim that the shareholders agreement and its two successors rely upon the agreements which include the purported governing arbitration clauses. It seems clear to the court, and I don't think it's seriously disputed by the parties, that the Second Amended and Restated Joint Venture and Shareholders Agreement is, and I think it's been described at various places by the parties as the operative agreement, is the primary agreement upon which the defendant bases [*sic*.] this motion. The agreement includes an arbitration provision which provides:

> "all disputes under this agreement shall be finally settled by arbitration in accordance with the rules of the United Nations Commission on International

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> Trade Law."

There are other aspects to the arbitration provision, that's not the entire provision, but I think that's the important part.

Plaintiffs argue that nothing in the restated shareholders agreement supplants any other rights or remedies available to the parties under law in general and cites another contractual provision from that contract that states that:

> "any rights or remedies conferred by this agreement on any party shall be in addition to and without prejudice to all other rights, powers and remedies available to such party, whether arising under law in general or any other document, deed or investment."

Plaintiffs further argue that while the parties cited UNCITRL arbitration rules, they did not use the broader, model UNCITRL arbitration clause which covers disputes related to or arising out of the agreement. And that provision reads, the model provision, which was an exhibit to the papers:

> "any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof."

Basically, plaintiffs argue, in addition to their

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other arguments, that the arbitration clause's language in the cited agreement is narrow, not broad, and in any event much narrower than the broad model UNCITRL arbitration clause, which includes the "arising out of or related to," language, rather than the "all disputes under this agreement" language.

Defendants also rely upon arbitration language in a distribution agreement between KPNQwest and Qwest's parent subsidiary, QCC, which has the same arbitration language as I just described in the shareholders agreement. Defendants also rely on a letter agreement between KPNQwest and QCC which incorporates the arbitration language from the restated shareholders agreement. Once again, these are agreements that KPNQwest entered into with Qwest subsidiaries, not Qwest itself.

This motion was extensively briefed and argued. With the court's permission, overlength briefs and lengthy surreplies and responses were submitted. In addition, there were extensive affidavits, exhibits that were submitted, some of which were quite complex, included dualing [*sic*.] translations of opinions on Dutch law, as well as other graphics, and things like that. The briefing was excellent, and I'm just not saying that, I think both parties are to be complimented on their thorough and aggressive arguments and the way they were presented.

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The motion was argued on March 3rd, 2005. At the argument and following the argument, the court was presented with additional exhibits and then there were additional letter briefs submitted thereafter.

Given the magnitude of the case and the importance of the issue, I wanted to make a brief comment on the authority of a magistrate judge to decide the issue of staying the case and compelling arbitration. Neither party contested or objected to my

deciding the motion, which was referred to me by Judge Lifland. And in the papers and also at argument, parties -- well, strike that. The movants confirmed that they were seeking a stay of the case pending arbitration, not dismissal. So that if the case were arbitrated, either party would have the option of asking this court to either confirm or vacate the award. And I think this point has some significance to the magistrate judge authority issue I raised. But the following cases suggest that a motion to stay the case and compel arbitration is considered to be a non-dispositive order that may be decided by a magistrate judge, beginning with Judge Chesler's decision in *Bevere v. Oppenheimer & Company*, 862 F. Supp. 1243 (D.N.J. 1994). There's also *Clary v. Stanley Works*, 2003 WestLaw 21728865 (D.Kans.); *Torrance v. Aames Funding Corporation*, 242 F. Supp. 2d 862, (D.Oregon 2002). *Herko v. Metropolitan Life*, 978 F. Supp. 141, (W.D.N.Y.

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1997), and *Touton, S.A. v. MV Rizcun Trader*, 30 F. Supp. 2d 508, (E.D.Pa. 1998).

The focus of this motion is arbitration. Implicated on the motion is the convention on the recognition and enforcement of foreign arbitrable awards. CREFA is codified in Chapter 2 of the Federal Arbitration Act, 9 U.S.C. Section 201-208.

The movants repeatedly argue and the plaintiffs don't dispute that the Federal Arbitration Act establishes that as a matter of federal law, doubts concerning the scope of the arbitrable issues should be

resolved in favor of arbitration. *Moses H. Cohen Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Also, *United Steel Workers of America versus Warrior*, 363 U.S. 574. I want to nòte at the outset that the court takes these policy statements favoring arbitration and requiring that the court have a -- give a healthy regard to the issue of arbitration very seriously. And I attempted as best I could to analyze the complex legal and factual arguments presented with these policies in mind.

However, plaintiffs have cited *Westmoreland v. Sadoux*, 299 F.3d 462 (5th Cir. 2002), and also, *McCarthy v. Azure*, 22 F.3d 251 (1st Cir. 1994) for the proposition that the federal policy favoring arbitration does not extend to situations in which the identity of who may invoke an

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arbitration clause is unclear. In *Westmoreland* the court stated, and I'll quote it:

> "We will read the reach of an arbitration agreement between parties broadly. But that is a different matter from the question of whom may invoke its protections. An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems - an openness this country has been committed to from its inception. It is then not surprising that to be enforceable an arbitration clause must be in writing signed by the party invoking it."

Many different arguments were presented by both sides on this motion. For example, defendants made various agency law arguments regarding the individual defendants, senior officers of Qwest. Plaintiffs argued that their mismanagement claim under Dutch law is a claim for the benefit of creditors that high [*sic*.] that is highly personal to the individual trustees and is not subject to arbitration unless the individual trustees signed an arbitration agreement, and they analogize this to the Third Circuit law *Hayes v. Merrill Lynch*, 885 F. 2d 1149 (3rd Cir. 1989) which according to plaintiffs holds that a bankruptcy

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trustee cannot be required to arbitrate Bankruptcy Section 544 avoidance claims pursuit [*sic*.] for the the [*sic*.] benefit of creditors. But before we get to these issues, to some extent these issues are secondary. Because the thrust of this case is a RICO fraud claim against the American corporation, Qwest Communications International. So to the court the threshold question is whether Qwest can compel plaintiffs to arbitrate that claim.

Now, it is not disputed that Qwest is not a signatory to any arbitration clause in the amended, Second Amended Shareholders Agreement or the other two agreements which seem to be in force or affect the claims here. In fact, none of the parties to the case, plaintiffs nor defendants, none of the parties are signatories to any arbitration agreement which governs the claims alleged in the complaint. And I don't know how significant it is, but that fact makes the case somewhat distinguishable from any other case

that I saw cited by the parties. However, the plaintiff trustees concede and of course cannot dispute that, for the purposes of the RICO claims only, they stand in the shoes of KPNQwest, which is a signatory to certain agreements, including the Second Amended and Restated Shareholders Agreement which include arbitration clauses. But since Qwest, defendant Qwest, is not a signatory to an arbitration clause that is operative, defendants must rely

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on another legal theory to permit the non-signatory defendant to attempt to compel the "signatory" plaintiff trustees to submit to arbitration. The theory advanced is equitable estoppel. And the motion really turns on the applicability of that doctrine, which the parties effectively agreed by silence at oral argument to my statement that the case really "boils down to a question of estoppel, equitable estoppel." I'm not relying on that silence in any way to decide the case or as a concession, but that is my opinion and I stated it at argument.

The analysis begins with a basic principle which the parties don't dispute. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. *See*, 9 U.S.C. Section 2 and 206, also, *AT&T Techs v. Communication Workers of America*, 445 U.S. 643 (1986). As stated in *Bel-Ray Co., Inc. v. Chemrite, Ltd.* 181 F.3d 435 (3rd Cir. 1999), if a party has not agreed by contract to arbitrate, courts cannot mandate that it do so. Thus, courts should be extremely cautious about enforcing arbitration in situations in

which the identity of parties who have agreed to arbitrate is unclear. *Intergen, N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003), *citing Bel-Ray*, 181 F. 3d at 444. However, a party may be compelled to arbitrate under an agreement even if it did not sign the agreement or

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a party -- strike that. A party may be compelled to arbitrate under an agreement or may be permitted to enforce an agreement even if it did not sign the agreement if common law principles of contract support such an obligation to arbitrate. *E.I. DuPont v. Rhone Poulenc Fiber and Resin Intermediates, SAS*, 269 F.3d 187 (3rd Cir. 2001). The contractual common law principle asserted in this case is equitable estoppel. There is much law and discussion in the briefing and also in the case law about how the doctrine of equitable estoppel applies when a signatory to an arbitration agreement attempts to compel a non-signatory to arbitrate. It is not important to get into too much detail about that aspect of equitable estoppel, because that's not the circumstance here. Rather, a non-signatory, Qwest, seeks to compel a signatory to arbitrate.

Defendants movants have cited case law from this and other circuits. Most notably, *Grigson v. Creative Artists Agency*, 201 F.3d 524 (5th Cir. 2000) and other cases which hold in very general terms that a non-signatory may be able to compel a signatory to arbitrate claims related to a contract, when: First, the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the

non-signatory; Second, which the signatory to the contract containing an arbitration clause raises allegations of

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substantial interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.

Plaintiff asserts [*sic.*] that Third Circuit law is different than other circuits and more restrictive of using equitable estoppel in this context. That other circuits have criticized the breath [*sic.*] of *Grigson* and similar cases, that even if the *Grigson* standard was the law in the circuit, defendants do not satisfy the *Grigson* test and cannot compel arbitration. Plaintiffs also point out that even under Fifth Circuit law the circumstances under which non-signatories may invoke an arbitration clause are "rare," *Bridas v. Turkmenistan*, 345 F. 3d 347 (5th Cir. 2003).

In the Third Circuit the authoritative case on the subject remains the [*sic.*] *DuPont v. Rhone Poulenc*, 269 F.3d 187. In *DuPont*, Judge Barry on behalf of herself and Judges Alito and Sirica, noted that the Third Circuit had not applied equitable estoppel to bind a non-signatory to an arbitration clause. But, Judge Barry went on to add that, "there appears to be no reason why in an appropriate case we would refrain from doing so." Judge Barry went on in *DuPont* to describe and acknowledge a theory of equitable estoppel applied in other circuits and relied on by defendants here in which courts have bound a

signatory to arbitrate with a non-signatory, which is described, and I'm going to quote

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from the case:

> "at the non-signatory's insistence because of the close relationship between the entities involved as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and the fact that the claims were intimately founded in and intertwined with the underlying contract obligations." 269 F.3d 199-200.

Ultimately, the Third Circuit found that the claims made in the complaint in *DuPont* were "too far removed from the relied upon agreement." However, in the opinion the Third Circuit went on to describe cases in other circuits, I'm going to quote again from the case, in which,

> "signatories were held to arbitrate related claims against parent companies who were not signatories to the arbitration clause. In each of these cases a signatory was bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract, and the fact that the claims were intertwined with underlying contractual obligations. In essence, a non-signatory

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> voluntarily pierces its own veil to arbitrate claims against a signatory that are derivative of its corporate subsidiary's claims against the same company," citing *Grigson*.

However, there does not seem to be a Third Circuit case analogous to *Grigson* and the theory, at least the theory that I just read, the second quote from the *DuPont* case, does not seem to have been adopted by the court, but it was acknowledged by the court. And, indeed, there is some Third Circuit authority, specifically, *Dayhoff, Inc. v. H.J. Heinz Company*, 86 F.3d 1287, *cert. denied*, 513 U.S. 1028 (1996), which I will discuss in some more detail later, which seems to preclude certain application or application of certain aspects of the *Grigson* analysis.

In a District Court decision from this circuit, a District Court decision, *Heller v. Deutsche Bank, AG*, 2005 WestLaw 665052 (E.D.Pa.), it was decided after oral argument in this case, the court referred to the theory of equitable estoppel at issue here - whether the claims were intimately founded in and intertwined with the underlying contract obligations and the court stated that in such situations, courts consider whether plaintiffs would have an independent right to recover against the non-signatory defendant even if the contract containing the arbitration clause was void, and

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they cite *Massen v. Cliff*, 2003 U.S. LEXIS 7392.

So, now to the issues in the case. I think the critical questions are as follows: Are the plaintiffs [*sic*.] claims "intimately founded in and intertwined with the underlying contract obligations"; "Are the plaintiffs relying on the specific operative contract to assert their claim"; "Would the plaintiffs have an independent right to recovery even if that contract was void."

Following careful consideration of the contract at issue, and the claims in the complaint, the court concludes that the trustees [*sic*.] claims are not intimately founded in and intertwined with the contracts at issue. In other words, the court finds that the trustees are not asserting claims against the non-signatories actually based on the agreement, and therefore the trustees cannot be estopped from proceeding with the case here.

Plaintiffs claim that Qwest itself perpetrated the fraudulent scheme at the heart of the complaint.

Despite a passing reference in one paragraph of the 125 page complaint, trustees do not rely on any written agreement to state their claims.

The trustees [*sic*.] claims are statutory.

Defendants [*sic*.] duties arise by law rather than by contract.

The trustees are not seeking to use any of the

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agreements as a basis to assert their rights.

There is little nexus between the restated shareholders agreement amongst the three Dutch entities governed by Dutch law, and trustees [*sic.*] claims against the American corporation and three American individuals, none of whom is a party to the agreement.

The Second Restated Shareholders Agreement is primarily addressed at the issue of organization. It states that it is governed by and construed in accordance with the law of the Netherlands. Trustees [*sic.*] claims are based on the mail fraud and wire fraud, similar type claims under United states law.

The thrust of the complaint, on the other hand, is that Qwest, the U.S. company, not Qwest BV, the Dutch signatory, engaged in a fraud largely taking place in the United States, in which it knowingly overstated its revenues and made other false statements about financial matters and engaged in false, fraudulent transactions in the United States. The agreement is narrowly focused on the organization of the joint venture, not including Qwest. According to the complaint the liquidation deficit was the result of a massive fraud. According to the complaint, the purpose of this fraud was to artificially prop up the value of both Qwest and KPNQwest, in order to ensure that Qwest's revenue projections could be concealed and that its inflated

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stock price preserved. These are all allegations, of course.

The complaint states that the primary way that Qwest carried out this fraud was a series of fictitious transactions designed to cause revenues to be overstated. While some of those transactions were with Qwest, some were with other parties. The transactions -- well, strike that, please. The trustees [*sic*.] RICO claims cite numerous instances of fraud ultimately causing KPNQwest to engage in transactions taking it to insolvency.

Thus, the focus of the agreement is on the organization of the joint venture and the rights that each stockholder will have by virtue of its stock ownership. It describes, among other things, the basic skeleton of the company, describing the authorized share capital and the relationship of the various shares, describing the ownership of the shares, the purpose of the joint venture, it describes other rights of ownership and describes a management structure. It provides for the composition of various boards, the management board and the supervisory board under Dutch law; the appointment of board members and various committees; maintenance of books of account; limitations on the transfer of shares; and other similar type obligations.

Despite what I would describe as a masterful

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attempt by defendants, and I mean that in a very complimentary sense, to breakdown [*sic*.] and fit the trustees' claims into certain basic provisions of the agreement, after reflection, I can't in good conscience find that the trustees' claims are intimately intertwined with these very basic organizational agreements. To so find, in the court's view, would essentially transmogrify the "intimately intertwined claims" language to mean something akin to "any connection to" regardless of the extent or significance. There is some connection between the agreements at hand, and some of the basic premises of the complaint. But I do not find that they are intimately intertwined. And according to the premises that the movants make under similar circumstances, a shareholders [*sic*.] suit could be arbitrable under the appropriate factual scenario even if a somehow related corporate entity chose not to sign the agreement. As in *DuPont*, albeit that case is factually different as well, the claims of the trustees are too far removed from the alleged arbitration clause for the defendant to invoke the doctrine of equitable estoppel.

In addition, it appears that plaintiffs would still have an independent right to recover on their claims against Qwest, even if the Restated Shareholders Agreement were declared invalid. Thus, the court finds the trustees' claims are not dependent on that agreement.

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Plaintiff [*sic*.] also argued, as I mentioned before, that nothing in the Restated Shareholders Agreement supplants any other rights or remedies available to the parties "under law in general." To the Contrary [*sic*.], the parties expressly agreed to that in the provision cited previously.

In reaching its conclusion, the court also took into account that consistent with the provision disclaiming any intention to displace the parties' rights and remedies under general law, the court believes that the arbitration clause limited to "disputes under this agreement" is indeed narrower than the model UNCITRL arbitration clause which relates to "arising out of or relating to this contract."

Now, defendants dispute that. This was not a decisive factor in the court's decision, but there is some authority to the effect that the "arising out of" language is broader, and in a different factual context the parties were not compelled to arbitrate a RICO claim because the RICO claim did not involve questions of interpretation and performance under the agreement. That's *Washburn v. Societe Commerciale de Reassurance*, 831 F. 2d 149 (7th Cir. 1989).

The *Dayhoff v. H.J. Heinz Company* case was mentioned before and it needs to be addressed. In *Dayhoff* the Third Circuit strongly held that a non-signatory parent corporation cannot "by reason of their corporate relationship" enforce an arbitration clause signed by a

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wholly owned subsidiary absent an agreement to that effect.

In its reply brief at page 20, defendants state, and I quote: "Qwest's entitlement to arbitration is based on plaintiffs [*sic*.] invocation of contractual obligations in the complaint, not on Qwest's parent subsidiary relationships." But to this court's view, *Dayhoff* is a significant obstacle to Qwest's attempt to arbitrate - it demonstrates, although it doesn't discuss the case at all, because there are certain agency concepts implicated in *Dayhoff* which are a little different than *Grigson* - but to this court, *Dayhoff* demonstrates the difference between the Third Circuit approach and the Fifth Circuit approach espoused in *Grigson*, where the court there relies to some extent on the contention that the claims against a signatory quote: "are derivative of its corporate subsidiary's claims against the same signatory."

In *Dayhoff*, the Third Circuit refused to allow a non-signatory to enforce an arbitration clause against a signatory. The Third Circuit specifically rejected the notion that a party signing an agreement, an arbitration agreement, thereby agrees to arbitration against -- excuse me, the Third Circuit specifically rejected the notion that a party signing an arbitration agreement thereby agrees to arbitrate against anyone but other signatories to the contract. The limitation applies even if the

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non-signatories merely seek to participate in an arbitration between two signatories. And that is at pages 1296-97. Even if it seems reasonable for other parties to join in the arbitration, or because there's some connection between their conduct and that of a signatory, *Dayhoff* suggests that is not sufficient. Rather, the general rule is that an arbitration clause "can be enforced only by the signatories to the agreement," page 1296. So, in *Dayhoff* the Third Circuit rejecteded [*sic.*] the claim that close affiliates involved in the same series of transactions could invoke the arbitration clause at issue.

Now, a brief word on the Fifth Circuit law that I mentioned and the parties discussed at length in their briefs. It's this court's view that even under *Grigson* defendants would have difficulty enforcing or forcing arbitration. Because in *Grigson* the claims were held arbitrable in part because they were dependent upon the contract containing the arbitration clause. That is not the case here. Indeed, the later Fifth Circuit case, *Westmoreland*, is more on point.

Westmoreland was a fraud claim. The signatory to a shareholders agreement brought a claim against a defendant non-signatory. The non-signatory controlled the entity that signed the agreement, and the non-signatory sought to arbitrate. The Fifth Circuit assumed the arbitration clause

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covered the claims that were asserted. Nonetheless, the defendant was precluded from invoking an arbitration clause in the agreement it had not signed. And the following quote from *Westmoreland* summarizes the thinking there:

> "For reasons advantageous to themselves, defendants were not parties to the shareholder [*sic*.] agreement and they did not negotiate an arbitration agreement regarding their personal claims and liabilities. This was no small matter. It gave them access to the courts for any claim they may have had against Westmoreland, subject to the limitation that they would have had to confront the arbitration agreement if they attempted to enforce the terms of that agreement.
>
> "These vital distinctions cannot be maintained by simply deploying the standard that the reach of arbitration clauses is to be read broadly, to the distinct problems of their applicability to non-signatories. Directly put, the courts must not offer contracts to arbitrate to parties who fail to negotiate them before trouble arrives."

In some ways, *Westmoreland's* [*sic*.] holding can be analogized to *Dayhoff's* [*sic*.].

> The recent Third Circuit case of *Bouriez v.*

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Carnegie Mellon, 359 F.3d 299 (3rd Cir. 2004) provides some support for denying this motion as well. In *Bouriez*, a case that is clearly factually distinguishable, the Third Circuit reversed a district court decision finding claims arbitrable based upon estoppel. Although the claims were "intertwined" with the contract containing an arbitration clause, they were not based on that contract, but rather, were "one step removed." 359 F. 3d 295. The court stated there, and I'll quote:

> "A dispute that arises under one agreement may be litigated notwithstanding a mandatory arbitration clause in a second agreement, even where the two agreements are closely intertwined. Such is the circumstance here."

I'm still quoting:

> "The District Court's contrary conclusion fails to acknowledge that plaintiff was one step removed from the 1996 agreement and, therefore, is not equitably estopped from avoiding the arbitration clause contained in the agreement," which is at pages 295-96.

Once again, in this case, I think the trustees [*sic*.] claims are too removed from the arbitration contracts. The thrust of the complaint is wrongdoing by Qwest, and for the reasons

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expressed, which is not a party to any operative arbitration agreement, and for the reasons expressed, may not compel arbitration under equitable estoppel.

As I stated perhaps even more than once, I think defendants did a tremendous job of presenting their position. And I want to be clear that this was a close call, that I struggled with for much time. Defendants [*sic*.] basic argument is quite plausible. It's possible it would be accepted in other circuits. But I could not find sufficient authority for it in this circuit. What I did was compare the complaint and the specific contracts that have been described, and I guess I'm repeating to some extent, but I could not conclude that the plaintiffs' complaint was premised on the contract. Nor could I conclude that the allegations of the complaint were intimately intertwined with the organizational contracts. Not just related, not just intertwined, the case law says intimately intertwined. Webster's definition of intimate is intrinsic, essential, marked by a very close association, strongly attached. And in the court's opinion that is just not the case here.

In light of my findings on the issue of equitable estoppel and request, I don't believe it's necessary to reach the agency arguments regarding the individual defendants nor the Dutch law mismanagement claim. Therefore, for the reasons I've expressed, defendants [*sic*.] motion

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to stay and compel arbitration is denied and the court will enter an order to that effect.

It's my intention to enter an order tomorrow to allow the parties to get copies of the transcript, if they wish it, and then proceed with their appeals.

I want to once again thank and compliment you on the excellent advocacy, and thank you for your patience.

MR. BERGSTEIN: Your Honor, before you get off the bench, I have an application.

THE COURT: Sure.

MR. BERGSTEIN: For discovery, you know, we -- we've had a lot of dispute about going forward with discovery, and the allegation that the passage of time might very well be prejudicial.

We were ordered to make initial disclosures, and that somehow got caught up in the mix of letters back and forth, but I would like Your Honor to -- to order that the initial discovery that you had already ordered, go forward now.

MR. CURTIN: Judge, given the court's ruling, I think the court is aware that Mr. Close is about to withdraw and new counsel will be appearing with me, perhaps the better course of action might be to just schedule a very quick conference with the court to work out some of these other issues.

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THE COURT: Well, I think that's a good -- Mr. Bergstein, I understand what you're saying. It's also clear, I could be wrong, but it seemed clear from the outset that with this motion, that the defendants I think intend to appeal it.

MR. BERGSTEIN: Yes, but that will be forever, I mean –

THE COURT: I understand.

MR. BERGSTEIN: I was young when I started this case.

THE COURT: I understand that.

But I guess I'm willing to schedule a conference or consider scheduling a conference, if you want to submit a short letter requesting it, and reminding -- I don't remember that we started with discovery, to be honest with you. It is a long time ago.

MR. BERGSTEIN: Yes.

THE COURT: I'll consider it, and I'll hear what the defendants have to say. But I'll see. It may be that I'll stay the proceedings until Judge Lifland weighs in. I'm not sure. But I appreciate.

MR. BERGSTEIN: We're talking about a year. I mean that's what it amounts to. And the passage of time and the likelihood of us recovering documents and people's memories and all are really substantial.

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THE COURT: Can you lay that out in writing for me, Mr. Bergstein. Maybe you already have, if you can send --

MR. BERGSTEIN: We have, I'll send the writing, I'll do it.

THE COURT: Doesn't have to be anything long. I'm not looking for briefs.

MR. BERGSTEIN: All right.

THE COURT: I've read enough paper.

MR. BERGSTEIN: You've heard the argument. Okay.

THE COURT: I understand.

Thank you very much.

MR. BERGSTEIN: Okay. Very good.

MR. CURTIN: Thank you, Your Honor.

THE CLERK: All rise.

(Court adjourned).